ORIGINAL

Joseph Mitchell
Canadian Illegal Alien State Prison
Prison # D-09632 (E-Wing-301L)
Post Office Box 689
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(Petitioner In Pro Se)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

07-4619 SI (PR)

JOSEPH MITCHELL,

Petitioner-Appellant,

v.

UNITED STATES ATTORNEY GENERAL, et al.,

Defendant-Appellee.

Docket No.:_____

APPLICATION FOR CERTIFICATE OF APPEALABILITY BASED ON THE DENIAL OF PETITION FOR HABEAS CORPUS, PURSUANT TO 28 U.S.C. §2241 et seq;

MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT OF COA

5

TO THE HONORABLE PRESIDING JUSTICES

IN AND FOR THE NINTH CIRCUIT COURT OF APPEALS

Petitioner-Appellant, Joseph Mitchell (heretoafter Petitioner), moves this Court to grant COA based on the Northern District Court's denial of 28 U.S.C. §2241 et seq., petition based on lack of jurisdiction. The Northern District Court failed to follow the governing United States Supreme Court citations regarding the retroactive application of the 1994, Immigration and Technical Corrections Act, Pub. L. No. 103-416, 108 Stat. 4305 ("INTCA"). See I.N.S. v. St. Cyr, 533 U.S. 289, 316, 121 S.Ct. 2271, 2289 fn. 42 (2001); and Fernandez-Vargas

v. Gonzales, 126 S.Ct. 2422, 2428 (2006) overruling the decision of **Campos v. I.N.S.**, 62 F.3d 311, 313 (9th Cir.1995), and that ("INTCA") is not retroactive to Petitioner's 1984 conviction of a "aggregated felony" under 8 U.S.C. §1101(a) (43)(a), which currently is the sole basis for this Canadian illegal alien's USINS detainer. Therefore, because "INTCA" is not retroactive as set forth in St. Cyr, and Fernandez-Vargas, section 225 of INTCA **does not** foreclose, or bar such substantive or procedural" relief under 8 U.S.C. §1252(i). Therefore, the prior Ninth Circuit decision must again be followed. See **Garcia v. Taylor**, 40 F.3d 299, 301 (9th Cir.1994) (recognizing it is "settled" that "prisoner aliens who seek mandamus to force the INS [now "BICE"] to start deportation proceedings do have standing"); **and** the decision of **Silveyra v. Moschorack**, 989 F.2d 1012, 1014 n. 1 (9th Cir.1991) ("held that 8 U.S.C. §1252(i) created a duty to incarcerated aliens because the plaintiff prisoner fell within the "zone of interests" protected by the underlying statute"). The Northern District Court ruling failed to address the retroactive application of "INTCA", §225.

Wherefore, Petitioner graciously requests this Court grant COA to resolve this Canadian illegal alien's due process rights to a fair and impartial "BICE" hearing, after 23 years of incarceration.

Dated this 27th day of September, 2007.

Respectfully Submitted,

Joseph Mitchell

JOSEPH MITCHELL
Canadian Illegal Alien State Prisoner
Petitioner In Pro Se
Without Bar Licensed Counsel

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF IMMEDIATE DEPORTATION

A. Federal Deportation Laws require . . . immediate deportation proceedings to commence against this Canadian illegal alien.

Petitioner maintains the United States District Court of San Jose California holds jurisdiction over his USINS detainer under No. A29213665. Petitioner is currently being held in the CDC&R at CTF-Soledad Level-II State Prison. Petitioner has requested CTF-Soledad Prison Personnel to contact San Jose Bureau of Immigration and Custom Enforcement ("BICE") to activate a charging document and to order Petitioner deportable as stated in Gonzalez v. Ashcroft, 369 F.Supp.2d 442, 447 (S.D.N.Y. 2005) ("A conviction for an aggravated felony at any time after admission to the United States subjects all aliens to removal." 8 U.S.C. §1227 (a)(2)(A)(iii).) The offenses that constitute "aggravated felonies" for the purposes of removal are enumerated in 8 U.S.C. §1101 (a)(43)"); and see U.S. v. Lopore, 304 F.Supp.2d 183, 186 (D.Mass.2004) ("Pursuant to U.S.C. §1227 (a)(2)(A)(iii), any alien who is convicted of an aggravated felony at any time after admission is deportable.")

Both the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and the illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), contain comprehensive amendments to the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. §1101 et seq. Under §237 (a)(2)(A)(A)(iii) of the INA (8 U.S.C. §1227(a)), noncitizens

are subject to deportation or removal based on the commission of an "aggravated felony." That is, under the terms of the INA, any noncitizen "who is convicted of an aggravated felony at any time after admission is deportable." Id. 8 U.S.C. §1251 (a)(2)(A)(iii). The INA not only subjects aliens to automatic deportation, it imposes severe sanctions against aliens convicted of aggravated felonies, barring them as ineligible for withholding deportation, and precluding asylum. Once deportation proceedings commence, the alien's rights are severely limited. For example, an aggravated felon facing deportation is presumed to be deportable. Id. 8 U.S.C. §1228 (c). The aggravated felon is also ineligible for discretionary relief from removal such as asylum, 8 U.S.C. §1158 (b)(2)(B)(I); restriction on removal, 8 U.S.C. §1230a (a)(3); and voluntary departure, 8 U.S.C. §1230b (a)(1).

Significantly, an aggravated felon who has been sentenced to an aggravated term of imprisonment of at least 5 years is also ineligible for withholding . . . removal under the Convention Against Torture ("CAT"). 8 U.S.C. §1231 (b)(3)(B); Wang v. Ashcroft, 320 F.3d 130, 136 n. 11 (2nd Cir.2003). The only possible relief an aggravated felon may obtain, if entitled to the protection of CAT, is to have his removal deferred to a country where he or she is not likely to be tortured. Id. 8 C.F.R. §208.17 (a). However, the aggravated felon is still subjected to immediate deportation to another country, but not one that will subject him . . . to torture. Petitioner maintains that he committed an aggravated felony

and now invokes his federal statutory right to a fair hearing and to be promptly deported back to his native country of Canada. See Lopez v. Heinauer, 332 F.3d 507, 512 (8th Cir.2003) ("To demonstrate a violation of due process, an alien must demonstrate both a fundamental procedural error and that the error resulted in prejudice.") In the present case Petitioner has been in state custody with an active USINS detainer for twenty-three years without state officials affording him any type of deportation hearing and, therefore, Petitioner has presented prejudice.

B. Petitioner is currently waiting to be deported back to Canada, however, State Prison Officials are forcing him to work under threat of severe punishment on the prison slave labor work force in direct violation of several federal illegal alien employment laws.

Just because Petitioner is a state prisoner waiting to be deported does not allow State Prison Officials to deliberately violate illegal alien labor laws and to force this Canadian illegal alien to work as a slave. See Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1110 (9th Cir.2001) ("In particular, the INS's position appears to be clearly inconsistent with the Supreme Court's holding in Wong Wing that illegal aliens within the territorial jurisdiction of the U.S. who had been ordered deported could not be put to hard labor prior to their deportation. Wong Wing v. United States, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896)" (emphasis added.) Petitioner maintains that regardless of his request for immediate transfer under the state Government Code §12012.1, and that federal deportation laws "override"

state laws and, therefore, Petitioner asserts that he is waiting to be deported based solely on federal mandatory NO suitability for U.S. parole federal law set forth within 8 U.S.C. §1182 et seq., and that illegal aliens waiting to be deported must not be forced to endure hard labor before deportation. Id., Wong Wing, 163 U.S. at 238. Therefore, San Jose (BICE) officials who currently have total control over Petitioner state incarceration and the unlimited power to activate Petitioner USINS warrant, which is authorized by federal statutory laws at anytime after the illegal alien serves five (5) years of his state sentence in accordance with 8 U.S.C. §1227(2)(I) and (II), must be enforced by this Federal District Court. 8 U.S.C. §1227 et seq., states: "any alien who is convicted of a crime involving moral turpitude committed within 5 years, after the date of the admission and is convicted of a crime for which a sentence of one year or longer may be imposed is deportable."

In addition, an aggravated felon who has been sentenced to an aggravated term of imprisonment of at least 5 years is also ineligible for withholding his deportation and immediate removal under the Convention Against Torture ("CAT") 8 U.S.C. §1231(b)(3)(B); Wang v. Ashcorft, 320 F.3d 130, 136 n. 11 (2nd Cir.2003). The limited relief that an aggravated felon may obtain, if entitled to the protection of CAT, is to have his removal deferred to a country where he or she is more likely not to be tortured. Id. 8 C.F.R. §208.17(a). However, even in this situation the aggravated

felon is still subject to immediate deportation to another country. In this case, Petitioner is from Canada and there is no problem with canadian officials torturing its citizens and, therefore, Petitioner waives his legal rights under CAT and **requests** immediate deportation to Canada.

Furthermore, the only other area of federal statutory immigration law which must be considered under the fair deportation hearing act, is the appeal process regarding this San Jose United States District "Court Order" granting immediate deportation, as set forth in 8 U.S.C. §1252(a)(2)(C) and **Henderson v. INS**, 157 F.3d 106, 119 (2nd Cir.1998). However, as stated in Henderson, Congress "intended to make . . . administrative decisions (regarding removal] nonreviewable in the fullest extent possible under the Constitution." Id. at 119. The limited judicial avenue available to criminal aliens waiting in the California Prison System to be deported is the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 231 (2005), which amended 8 U.S.C. §1252 to provide judicial review of an order of removal on the form of a "petition for review" in the Court of Appeals. However, this Canadian illegal alien also waives his right to any appeal under the REAL ID Act and absolutely maintains that he is a native of Canada who was convicted of an aggravated felony, which requires his deportation forthwith. (See Excerpt (1) for reference to Petitioner's Birth Certificate and Canadian Social Insurance Number.) Based on these factors this Canadian illegal alien is overdue for deportation.

C. Petitioner maintains that under the United States Supreme Court decision of INS v. St. Cyr, 533 U.S. 289, 325, 121 S.Ct. 2271, 2293, 150 L.Ed.2d 347 (2001), it is mandatory that this aggravated felon be deported to his country of origin forthwith.

Although one can describe the level of certainty of deportation for aggravated felons as mandatory, required, predictable, highly likely, the Second Circuit has described the likelihood as "automatic," United States v. Couto, 311 F.3d 179, at 184 (2nd Cir.2002) and moreover the United States Supreme Court calls it "Certain." INS v. St. Cyr, supra, 533 U.S. at 325. Therefore, this Canadian illegal alien must be deported immediately.

D. Any state law used to keep this Canadian illegal alien in the California Prison System must be "overridden" and that all the federal statutory deportations laws set forth in this motion are superior to any state law requirements.

Petitioner asserts that all the above deportations laws govern his current incarceration in the California Prison System and that State Prison Officials cannot argue that "State Law" overrides "Federal Statutory Deportation Laws regarding aggravated felons." Petitioner maintains that the United States Supreme Court made very clear in Freightliner Corp. v. Myrick, "We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275, 110 L.Ed.2d 65 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for private party

to comply with both state and federal requirements," id., at 79, 110 S.Ct., at 2275, or where state law "stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 541 (1941)." Id. 514 U.S. 280, 115 S.Ct. 1483, 1487 (1995).

Petitioner absolutely maintains that (BICE) officials are responsible for deporting illegal aliens and the Congress did not intend for "state administrative" boards to make the decision when state prisoners have federal USINS holds placed on them or for state prison officials to use state law to "override" statutory federal deportation laws.

E. Petitioner maintains that CTF-Soledad State Prison Officials have refused to afford Petitioner any type of a deportation hearing and refuse to hear Petitioner's 602 Inmate/Appeal where Petitioner is requesting to be deported within federal statutory deportation laws and, therefore, prison officials are violating Administrative Procedure Act, 5 U.S.C. §706 (1)&(2) (A)&(C).

Petitioner maintains that CTF-Soledad Prison Officials have failed to implement an information system to assist illegal aliens in the deportation process and to aid San Jose (BICE) officials with information regarding convicted aggravated felons housed in the prison and this action is arbitrary, capricious, and certainly is an abuse of discretion. CTF-Soledad Prison Officials action or inaction is not in accordance with any federal statutory deportation laws and positively violates the Administrative Procedure Act, 5 U.S.C. §706 (1) & (2)(A) & (C). The Ninth Circuit Appeals Court stated in Cilbent v. National Transportation Safety Board,

80 F.3d 364, 368 (9th Cir.1996) ("5 U.S.C. §706 imposes a uniform standard of review over agency determinations without drawing any such distinctions. Indeed, we have applied an arbitrary and capricious standard of review in upholding an agency's refusal to accept late appeals to its Board in accordance with its internal regulatory guidelines.")

The prison officials here at CTF-Soledad refuse to hear Petitioner's appeal where he asked the prison administrators to activate his USINS detainer No. A29213665 and to turnover his custody to (BICE) Officials in San Jose California. The prison officials in their CDC 695 response stated that they do not have subject jurisdiction of these federal deportation laws and that Petitioner must pursue the matter through the appropriate agency, which in this case is this U.S. District Court. (See Excerpt (2) for reference to CDC 602 Inmate/Appeal filed regarding federal deportation laws.)

F. Petitioner has complied with the Prison Litigation Reform Act (PLRA), 42 U.S.C. §1997e(a) as required by the United States Supreme Court in Booth v. Churner, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825 (2001).

In Booth v. Churner, the Supreme Court held that inmates must exhaust administrative remedies, regardless of the relief offered through the administrative procedure. Id. at 741. However, the Sixth Circuit Appeals Court stated in City of Mount Clemens v. U.S.E.P.A., 917 F.2d 908 (6th Cir.1990) ("Although exhaustion remedies is typically required as a condition for judicial review, the requirement is not absolute. The doctrine must be applied in each case with an understanding

of its purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions. Thus, exhaustion is not required if administrative remedies are inadequate or not efficacious; [or] where pursuit of the administrative remedies would be a futile gesture." [Citation omitted].) see also Shawnee v. Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir.1981) ("exhaustion is not required if administrative remedies are inadequate"); and Mathews v. Diaz, 426 U.S. 67, 76, 96 S.Ct. 1883, 1889, 48 L.Ed.2d 478 (1976) ("Where the only issue presented for review was the constitutionality of a provision of the Social Security Act, exhaustion of administrative remedies would have been futile"). Petitioner maintains he should not be forced to exhaust anymore administrative appeals based on the deportation laws within the CDC&R system and that all appeals are futile.

In Brown v. Valoff, 442 F.3d 926 (9th Cir.2005) we read: "While over-exhaustion may be wise so as to expedite late litigation, the fact remains that Booth does not require an inmate to continue to appeal a grievance once relief is no longer available." Id. at 949 fn. 10. As stated above Petitioner presented his appeal to CTF-Soledad Prison Officials which have stated that they lack jurisdiction to hear the federal statutory deportation laws and, therefore, all administrative appeals have been completed.

G. Petitioner maintains that under deportation rights this case must be considered under "equal protection" and that his "aggravated felony" is listed under 8 U.S.C. §1101(a)(43)(A) as all other listed "aggravated felons" now being deported and that every other State Prison System in the United States is allowing inmates convicted of second degree murder to be deported after the 5 year period is served.

In Gonzalez v. Ashcroft, supra, 369 F.Supp.2d 442 (S.D.N.Y.2005) ("A conviction for an aggravated felony at any time after admission to the United States subjects an alien to removal. 8 U.S.C. §1227 (a)(2)(A)(iii). The offenses that constitute "aggravated felonies" for the purposes of removal are enumerated in 8 U.S.C. §1101 (a) (43)." Id. at 447.) Petitioner's state crime is listed under (43)(A) (second degree murder one count). Petitioner argues that his deportation must be considered under "equal protection." See Plyler v. Doe, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (holding that aliens are protected by the Fifth Amendment's equal protection guarantee). To establish an equal protection violation, therefore, Petitioner must identify a class of similarly situated persons who are treated dissimilarly. See Anderson v. Cass County, Mo., 367 F.3d 741, 747 (8th Cir.2004).

Petitioner positively asserts that state prisoners (illegal aliens) convicted of second degree murder in States other than California, are being deported to Their native countries under the same federal deportation laws, which should equally be applied to this California illegal alien state prisoner. Petitioner supports his contentions based on the federal deportation cases of Tulloch v. I.N.S., 175 F.Supp.2d 644, 647 (S.D.N.Y.2001); Boston-Bollers v. I.N.S., 106 F.3d 352, 353 (11th Cir.1997); James v. Reno, 97 Fed.Appx. 340 (2nd Cir.2004) and also Giap v. I.N.S., 311 F.Supp.2d 438, 439 (S.D.N.Y.2004) ("In 1997, a jury in New York City convicted

Giap of second degree murder, for which he was sentenced to 25 years to life in prison. Following that conviction, the Immigration and Naturalization Service ("INS") charged Giap with being deportable as an alien convicted of a aggravated felony. See 8 U.S.C. §1227 (a)(2)(A)(iii)."

Petitioner's second degree murder falls within the same federal deportation laws as set forth in all the above second degree murderers cases, which have been deported back to their native countries. All of the above second degree murderers served five (5) years before INS officials initiate deportation proceedings, however, this Canadian California illegal alien prisoner has served more time on his second degree murder than any of the above murderers, but (BICE) agents from San Jose still have failed to initiate deportation proceedings in this case, which Petitioner maintains is arbitrary and capricious and violates his equal protections rights.

H. Petitioner maintains that his indefinite detention based on his USINS detainer as an illegal alien Canadian California State Prisoner violates his due process right to a fair and impartial deportation hearing within a reasonable amount of time served on his California one count second degree murder.

Petitioner asserts that he has now served twenty-three (23) years for his one count second degree murder and that (BICE) agents located in San Jose California have refused to initiate Petitioner's USINS detainer. The United States Supreme Court stated in Zadvydas v. Davis, "A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprive" any "person

. . . of . . . liberty . . . without due process of law." Id. 533 U.S. 678, 121 S.Ct. 2491, 2498-99 (2001) (in relevant part.) Indeed, "Petitioner's statutory claim that he is being detained without the possibility of a fair and impartial deportation hearing can be heard on habeas because it effects a substantial right of Petitioner's in accordance with all the above mentioned federal deportation laws. See Velasquez v. Reno, 37 F.Supp.2d 663, 669 (D.N.J.1999) (quoting Henderson v. INS, 157 F.3d 106, 122 (2nd Cir. 1998) "Stating that statutory claims affecting the substantial rights of this sort courts have secularly enforced.")

Petitioner has now served twenty-three (23) years on his USINS detainer No. A29213665 and that the delay by BICE agents to effectuate any type of deportation proceedings is unreasonable, arbitrary and capricious. Because Petitioner alleges his due process rights are being violated under the test enunciated in Barker v. Wingo, 407 U.S. 514 (1972), for evaluating delays under the Sixth Amendment, is often used to evaluate delay under the Due Process Clause. Id. 407 U.S. at 530. In this case Petitioner has not received any information from CTF-Soledad Prison Officials when BICE agents will activate his USINS detainer and start the deportation process. In Baker the U.S. Supreme Court described a five (5) year delay as "extraordinary." Id. 407 U.S. at 533; see also U.S. v. Doggett, 906 F.2d 573, 578 (11th Cir.1990) ("Ringstaff, the 11th Cir. found a twenty-three month delay to be presumptive prejudicial. Id. 885 F.2d at 1543, quoting

cf. Bagg, 782 F.2d 1542 "thirty-six month delay presumptively prejudicial" and Dannard, 722 F.2d at 1513 "fifteen month delay presumptively prejudicial.")

In sum, this Petitioner has now served twenty-three years in the California Prison System and does maintain the "BICE" agents from San Jose have abused their administrative discretion, when they refused to initiate deportation proceedings within the reasonable amount of time in accordance with 8 U.S.C. §1252a(d)(1). See Immigration & Naturalization Serv. v. Yany, 519 U.S. 26, 32, 117 S.Ct. 350 (1993) ("irrational departure" from "general policy" governing exercise of administrative discretion "could constitute . . . an abuse of discretion").

I. Petitioner maintains that in accordance with the mandate set forth in I.N.S. v. St. Cyr, 121 S.Ct. 2271, 2287 (2001), AEPDA and IIRIRA did not repeal habeas corpus relief pursuant to 28 U.S.C. §2241.

The United States Supreme Court made perfectly clear that habeas corpus was still available for illegal alien prisoner after the effective dates of the AEDPA and IIRIRA. As set forth in I.N.S. v. St. Cyr, "held that a deportable alien had a right to challenge the Executive's failure to exercise the discretion authorized by the law. [See 8 U.S.C. §1252a(d)(1)]. The exercise of the District Court's habeas corpus jurisdiction to answer a pure question of law in this case is entirely consistent with the exercise of sure jurisdiction in Accardi" (quoting United States ex rel. Hintopoulos v. Shaughnessy, 352 U.S. 72, 77, 77 S.Ct. 618

(1957). When the Northern District Court stated in the denial that "the Court lacked jurisdiction," was a statement in error, and this Court should remand this case back to the Northern District Court, to hear Petitioner's 28 U.S.C. §2241 petition.

J. Petitioner asserts that the Immigration and Nationality Technical Corrections Act of 1994, Pub.L. No. 103-416, 108 Stat. 4305 ("INTCA"), Section 225 is **NOT** retroactive to proceedings already in process before "INTCA" inception date.

Petitioner maintains that the general provision set forth in section 225 of "INTCA," or any of the different provision of "IIRIRA" designed to limit current §2241 habeas corpus relief, or mandamus review are not retroactive to past actions already commenced, and only apply from their day of inception. As stated in I.N.S. v. St. Cyr, "The presumption against retroactive application of ambiguous statutory provisions, buttressed by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," [quoting] INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), Id. 121 S.Ct. at 2290. Also, "The INS' reliance, see Reply Brief for Petitioner 12, on INS v. Aguirre-Aguirre, 526 U.S. 415 420, 119 S.Ct 1439, 143 L.Ed.2d 590 (1999), is beside the point because that decision simply observed that the new rules would not apply to a proceeding filed before IIRIRA's effective date." Id. 121 U.S. at 2289 fn. 42.

Therefore, this Court's decision in Campos v. I.N.S., 62 F.3d 311, 313 (9th Cir.1995) must be reversed. The Campos decision allows the INS (now "BICE") officials to apply the

1994 "INTCA" to proceedings rendered before its enactment and, therefore, violates the mandate set forth in INS v. St. Cyr, which ruled that "IIRIRA" was not retroactive in alien deportation cases. Id. 121 S.Ct. at 2288. Unless "Congress has directed with the requisite clarity that the law be applied retrospectively." Id. 121 S.Ct. at 2288 (quoting Martin v. Hadiz, 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999). Also, "The INS' argument that refusing to apply §304(b) retroactively creates an unrecognizable hybrid of old and new is, for the same reason, unconvincing." Id. 121 S.Ct. at 2288 fn. 40.

In addition, a "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." Id. at 121 S.Ct. at 2288 (quoting Landgraf, 511 U.S., at 257, 114 S.Ct. 1483. Moreover, "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal"' (quoting Kaiser, 494 U.S., at 855, 110 S.Ct. 1570 SCALIA, J., concurring). Most importantly, "Statutes are disfavored as retroactive when their application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." **Fernandez-Vargas v. Gonzales**, 126 S.Ct. 2422, 2427-28 (2006) (quoting Landgraf, supra, at 280, 114 S.Ct. 1483.

K. This Court's decision in Campos v. I.N.S., 62 F.3d 311, 313 (9th Cir.1995) was rendered before the United States Supreme Court decisions in INS v. St. Cyr, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); Fernandez-Vargas v. Gonzales, 126 S.Ct. 2422 (2006), which abrogates this Court's decision in Campos, and that "INTCA" was retroactive, when Congress did not explicitly indicate that it intended such a result.

Petitioner maintains that this Court's decision in Compos v. I.N.S., 62 F.3d at 313 was rendered in error. First, this Court on its own accord decided in Compos that Section 225 of the 1994 "INTCA" was retroactive to aliens who had USINS detainers placed on them before the effective date of "INTCA." Petitioner asserts that the Congress did not authorize the Ninth Circuit Court of Appeals to made the Immigration and Nationality Technical Corrections Act of 1994, Pub.L. No. 103-416, 108 Stat. 4305 ("INTCA") retroactive. In Fernandez-Vargas v. Gonzales, 126 S.Ct. at 2428 ("Accordingly, it has become "a rule of general application" that "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." [Quoting] United States v. St. Louis, S.F. & T.R. Co, 270 U.S. 1, 3, 46 S.Ct. 182, 70 L.Ed. 435 (1926) (opinion for the Court by Brandeis, J.). Also, the Supreme Court set forth in Fernandez-Vargas v. Gonzales, the law in regards to retroactive federal statutes. "We first look to "whether Congress has expressly prescribed the statute's proper reach," Landgraf, supra, at 280, 114 S.Ct. 1483, and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended

by applying "our normal rules of construction," Lindh v. Murphy, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). If that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of "affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." Landgraf, supra, at 278, 114 S.Ct. 1483; see also Lindh, supra, at 326, 117 S.Ct. 2059. If the answer is yes, we then apply the presumption against retroactivity by constructing the statute as inapplicable to the event or act in question owing to the "absen[ce of] a clear indication from Congress that it intended such a result." [Quoting] INS v. St. Cyr, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (1999) (quoting Landgraf, supra, at 280, 114 S.Ct. 1483). Id. 126 S.Ct. at 2428.

Petitioner asserts that this Court **did not** consider these above Supreme Court mandates before denying relief in Campos v. I.N.S., 62 F.3d 311. This Court **did not** state whether Congress had intended INTCA to be applied retroactively based on explicit language therein. Petitioner maintains that he has read INTCA and finds **NO** statement therein that Congress wanted the Circuit Courts to apply the mandates therein retroactively and, therefore, this Court should reconsider its decision in Campos. This Canadian illegal alien has been incarcerated for over 23 years without any I.N.S. (now "BICE") hearing regarding his mandatory deportation pursuant to 8 U.S.C. §1252(i) which provides:

> "In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General **shall** begin any deportation proceeding as expeditiously as possible after the date of the conviction."

Because INTCA is not retroactive to Petitioner's conviction date of 1984 and the USINS detainer hold of 1984, the law before Campos is applicable, which in this case is **Garcia v. Taylor**, 40 F.3d 299, 301 (9th Cir.1994). Petitioner maintains the District Court should have applied the mandates set forth in Garcia to Petitioner's current dilemma, 23 years without any USINS deportation hearing. Petitioner in the past wrote several letters to INS officials over the years, which have never been answered. Petitioner has tried to file a 28 U.S.C. §2241 habeas corpus petition with the deportation court in San Diego, which refused to accept the petition because INS officials had not initiated a charging document. (See separately filed **Excerpts** of the Record (3) for reference.)

Petitioner has also tried to file an appeal with CTF-Soledad State Prison Officials asking the prison officials to contact "BICE" agents in San Jose and to ask them to initiate deportation proceedings, however, the Prison Officials refused to hear the appeal and stated that they have **NO** jurisdiction over federal laws dealing with deportation of illegal aliens. (See separately filed Excerpts of the Record **(2)).**

Also, because INTCA is not retroactive to Petitioner's 1984 conviction and USINS detainer, in accordance with the

U.S. Supreme Court decisions of St. Cyr and Fernandez-Vargas, and due to the fact Petitioner is arguing that San Jose "BICE" agents failed to follow several federal statutory laws, such as 8 U.S.C. 1252(i) and several others set forth above, this Court should allow Petitioner to proceed with his 28 U.S.C. §2241 habeas corpus petition in the Northern District Court on the merits. This Court stated in Garcia, 40 F.3d at 304: "Should the INS wait to take action to commence proceedings until four to six months before the release date, habeas corpus may well then be available." Petitioner has now waited 23 straight years without INS, or BICE agents affording Petitioner's type of fair and impartial deportation hearing under the mandatory **shall** language set forth in 8 U.S.C. §1251(i) and, therefore, having violated Petitioner's federal due process right to a fair and impartial deportation hearing within a reasonable amount of time, this Court should remand.

CONCLUSION

Based on the foregoing, this Canadian illegal alien who has served beyond the sentencing guideline range for his one count second degree murder, should be granted a mandatory deportation hearing in accordance with 8 U.S.C. §1252(i), and due to his aggregated felony status under 8 U.S.C. §1101a (43)(a). The district court order denying relief must be reversed and this matter should be remanded for further proceeding consistent with the mandates of the United States Supreme Court.

Wherefore, Petitioner graciously requests this appeal

be granted.

Dated this 27th day of September, 2007.

Respectfully Submitted,

Joseph Mitchell Canadian Illegal Alien
Petitioner In Pro Se
Without Bar Licensed Counsel

PROOF OF SERVICE BY MAIL
BY PERSON IN STATE CUSTODY
(C.C.P. §§ 1013(A), 2015,5)

I, Joseph Mitchell, declare:

I am over 18 years of age and I am party to this action. I am a resident of CORRECTIONAL TRAINING FACILITY prison, in the County of Monterrey, State of California. My prison address is:

Joseph Mitchell, CDCR #: D-09632
CORRECTIONAL TRAINING FACILITY
P.O. BOX 689, CELL #: E-301-L
SOLEDAD, CA 93960-0689.

On Joseph Mitchell 9-27-07, I served the attached:

Application For COA

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope (verified by prison staff), with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named institution in which I am presently confined. The envelope was addressed as follows:

Ninth Circuit Court of Appeals
Post Office Box 193939
San Francisco, Ca. 94119-3939

Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, Ca. 94102-7004

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on September 27th 2007.

Joseph Mitchell
Joseph Mitchell
Declarant Pro Se Petitioner
Prisoner ID # D-09632 / E-301-L